

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DAYTON AREA CHAMBER OF
COMMERCE, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity
as Secretary of the U.S. Department of
Health and Human Services, *et al.*

Defendants.

Case No. 3:23-cv-00156-MJN-PBS

**MEMORANDUM OF LAW IN SUPPORT OF CONSENT MOTION FOR LEAVE
TO FILE BRIEF OF AMICUS CURIAE ABRAMS INSTITUTE FOR FREEDOM
OF EXPRESSION IN SUPPORT OF DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO
DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

The Abrams Institute submits this proposed *amicus* brief to address the First Amendment claim advanced by plaintiff that the operative terms used in a government contract drug manufacturers must sign to participate in a voluntary Medicare program should be considered compelled “speech” protected by the First Amendment. This effort to recast regulated conduct as regulated speech, if taken to its logical conclusion, would threaten to subject to heightened First Amendment scrutiny vast swaths of well-established law—from contracts, to antitrust, to health and safety regulations.

ARGUMENT

While neither the Local Rules for the District of Connecticut nor this Court's Individual Rules of Practice address the submission of *amicus* briefs, this Court has found participation as an amicus is within "the sound discretion of the court." *U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati*, No. 1:03-CV-00167, 2009 WL 485501, at *6 (S.D. Ohio Feb. 26, 2009) (quoting *United States v. State of Michigan*, 940 F.2d 143, 165 (6th Cir. 1991)). In determining "whether to accept the submission of an amicus curiae brief [courts] consider whether the information offered by the amicus is timely, useful, or otherwise necessary to the administration of justice. Granting leave to appear as an amicus is appropriate when a party has an important interest and a valuable perspective on the issues presented." *Sigetich v. Kroger Co.*, No. 1:21-cv-697, 2022 WL 2900766 at *2 (S.D. Ohio July 22, 2022) (internal quotations omitted).

Proposed *amicus curiae* Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, access to information, and government transparency. The Abrams Institute regularly litigates First Amendment claims and has a keen interest in defending robust constitutional protections for the freedoms of speech and press as critical safeguards of our democratic system. Proposed *amicus curiae* has expertise on issues of compelled speech and the distinctions between regulations of conduct and expression. Proposed *amicus curiae* writes regarding the implications of plaintiff's theory that collapses those distinctions and imperils various longstanding laws. Proposed *amicus curiae* respectfully submit the brief will be helpful to the court's resolution of the issues. Plaintiffs and Defendants consent to this motion.

CONCLUSION

For these reasons, proposed *amicus curiae* respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

Of counsel:

David A. Schulz
Tobin Raju
Media Freedom & Information Access Clinic
Yale Law School ¹
1675 Broadway, 19th floor New York, NY 10019
(212) 663-6162
david.schulz@yale.edu

/s/ David Marburger
David Marburger (0025747)
Marburger Law LLC
14700 Detroit Ave., Suite 1
Cleveland, OH 44107
216/930-0500
email: dmarburger@icloud.com and
tina@marburger-law.com

Counsel for movant Abrams Institute for
Freedom of Expression (proposed *amicus curiae*)

¹ The views expressed herein do not purport to represent the institutional views of Yale Law School, if any.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served upon the following counsel of record electronically through the Court's ECF system on this 21st day of December, 2023:

King & Spalding LLP

Jeffrey S. Bucholtz (*pro hac vice*)
Christine M. Carletta (*pro hac vice*)
Alexander Kazam (*pro hac vice*)
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com
ccarletta@kslaw.com
akazam@kslaw.com

Gregory A. Ruehlmann (No. 0093071)
1180 Peachtree Street NE
Suite 1600
Atlanta, GA 30309
(404) 572-4600
gruehlmann@kslaw.com

Porter Wright Morris & Arthur LLP

Tami H. Kirby (No. 0078473)
Emma M. Walton (No. 0100024)
One South Main Street, Suite 1600
Dayton, OH 45402
Tel. (937) 449-6721
Fax (937) 449-6820
tkirby@porterwright.com

U.S. Chamber Litigation Center

Andrew R. Varcoe (*pro hac vice*)
Jennifer B. Dickey (*pro hac vice*)
1615 H Street NW
Washington, DC 20062
(202) 463-5337

Attorneys for Plaintiffs

Stephen M. Pezzi
Senior Trial Counsel
Alexander V. Sverdlov
Michael J. Gaffney
Christine L. Coogle
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-8576
stephen.pezzi@usdoj.gov
alexander.v.sverdlov@usdoj.gov
michael.j.gaffney@usdoj.gov
christine.l.coogle@usdoj.gov

Attorneys for Defendants

/s/ David Marburger